

File #

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

In the Matter of Whether Land Owned)	
by Benjamin J. Fries, Located in the)	
Town of Pine Lake, Oneida County,)	Case No. IH-95-11
Shall Continue Designated as Managed)	
Forest Land)	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Managed Forest Law Order No. 44 022 1990 dated November 13, 1989 designated certain lands in Township 37 North, Range 8 East, Section 24, as Managed Forest Lands. The owner entered into a management plan on July 19, 1989 which specified in part a completion date of December 31, 1993. On May 26, 1995, the Department of Natural Resources entered Withdrawal Order No. 44 022 1990 alleging that the owner had failed to comply with the provision of the management plan by December 31, 1993. The Withdrawal Order further alleged that the Department worked with the owner to develop a mutually agreeable amendment to the management plan but it was unable to do so. Further, the Withdrawal Order alleged that an investigation by the Department of Natural Resources has found the owner of the land listed above is in violation of Managed Forest Law for failure to comply with the management of plan signed July 19, 1989.

On July 5, 1995, the Department of Natural Resources received a request for a contested case hearing from Mr. Fries disputing the entry of the May 26, 1995 Withdrawal Order.

On August 3, 1995, a prehearing conference was conducted by telephone, Jeffrey D. Boldt, Administrative Law Judge (the ALJ) presiding. A hearing was set for November 28, 1995. Subsequently, the parties agreed to set the matter over until July of 1996. Pursuant to due notice, a hearing was held on July 25, 1996, at Rhinelander, Wisconsin, with the same ALJ presiding.

At the close of hearing, the parties requested an opportunity to submit written closing arguments. The last submittal relating to the case was received on November 6, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Benjamin J. Fries
3306 Broken Branch Ct., #133
Sacramento, CA 94834

The Department of Natural Resources (the DNR or the Department), by

Jim Christenson, Attorney
P. O. Box 7921
Madison, WI 53707-7921

FINDINGS OF FACT

1. Mr. Benjamin J. Fries, 3306 Broken Branch Ct., #133, Sacramento, CA 94834, applied for participation in the Managed Forest Land (MFL) law program on July 19, 1989.

2. On November 13, 1989, the DNR entered an Order designating certain property in the Town of Pine Lake under the MFL program. Specifically, the following lands were entered:

	Open Acres	Closed Acres	Total Acres
Township 37 North, Range 8 East	.00	4.00	4.00
Section 24 SENW, Pt of Lot 004	.00	16.00	16.00
Total Acreage For Order	.00	20.00	20.00

The effective date of the Order was January 1, 1990. (Exhibit 3)

3. In conjunction with entry of the above-described lands in the MFL program, the Department and Fries entered into a Managed Forest Law Management Plan (the Management Plan) on July 19, 1989.

One component of this plan related to stand No. p 1 and required certain cuttings prior to the end of 1993 (i.e. December 31, 1993). The relevant portion read as follows:

(PR 5-9") (7 acres) This red pine pole stand is being managed for sawlogs. Selectively thin this stand by cutting suppressed and poor quality trees. Thin to a residual basal area of 90 square feet per acre. (Exhibit 4)

There is no real factual dispute that this portion of the Management Plan has not been followed by Mr. Fries.

4. In an effort to resolve the dispute with Mr. Fries, the Department prepared a new MFL Plan and forwarded it to him on November 10, 1994. (Exhibit 5) The revised plan reflected in part the desire of Mr. Fries to manage his pine plantations primarily for pole production.

5. Mr. Fries did not agree to the Department's proposed revised November, 1994 MFL. (Exhibits 8 and 10) Fries submitted a counter-proposal on December 29, 1994. (D-Exhibit 10)

6. The Department of Natural Resources did not accept the December 29, 1994, proposal of Mr. Fries. The principal objections to the Fries' proposal were as follows:

- A. The DNR could not accept Fries' proposal because portions of the stand would exceed the "A" curve to the red pine stocking chart after thinning.
- B. The DNR relied on red pine stocking chart guidelines that are the accepted standard in the practice of forestry. The thinning levels and timing are based on the principal of stocking and not on the products to be harvested. Fries argued that, given his desire to harvest poles as his principal market use of his trees, it was appropriate to exceed the red pine stocking chart as reflected in the Benzie study. The Department did not accept Mr. Fries' position on this issue.
- C. Fries also alleged that the management plan which he had signed was not an enforceable contract. The Department restated its long standing position that in fact the management plan is an enforceable contract. (D-Exhibit 11)

7. On March 3, 1995, the Department mailed a "Notice of Investigation" to Mr. Fries. The Notice of Investigation alleged that Fries had failed to follow the mandatory practice of developing an acceptable cutting proposal. The Notice of Investigation further alleged that failure to complete this practice as specified in the management plan could result in land being withdrawn from the managed forest law and assessed a withdrawal penalty.

8. On April 15, 1996, Mr. Fries submitted a Cutting Notice and Report of Wood Products from Forest Crop and Managed Forest Lands form. Fries proposed removing suppressed, poorly formed and porcupine damaged red pines from red pine plantation number one and to remove selected hard wood and balsam overstory from the white pine plantation P-4. On May 15, 1996, the Department responded to the latest cutting notice proposal of Mr. Fries. The Department indicated that the proposed plan was denied and that the cutting notice must be based on the management plan as previously agreed to by both parties. The Department indicated that the plan signed in 1989 requires thinning stand P-1 to a residual stocking level of 90 square feet of basal area per acre. The Department stated that the proposed cutting did not conform to the management plan and was accordingly denied. The Department further stated that the latest cutting notice proposal of Mr. Fries was actually more objectionable than his earlier proposals in terms of the residual stocking densities for the red pine planation.

9. The most contentious issue between the parties relates to the extent to which it is reasonable for the Department of Natural Resources to rely on the Benzie stocking density chart. The Benzie chart is based on the Managers Handbook for Red Pine in the North Central State General Technical Report NC33 Publication of the 1977 U.S. Department of Agriculture. The Benzie chart was based in large part on data gathered from a 1934 study of managed red pine forest stands. (P-Exhibit 7) Fries argues that the Benzie chart is unreliable because that data base was likely based in part on wild growth forests that have characteristics dissimilar from managed forest plantations. However, on its face the Benzie stocking chart states that it relies largely on managed stands from the Brown and Gervorkiantz 1934 normal yield table. The Benzie chart used an adjustment factor of eighty percent of that 1934 table. Fries makes much of this subjective adjustment factor of eighty percent to attempt to discredit the Benzie chart.

However, Tim Mulhern, DNR Forester Supervisor, testified that the Managers Handbook for Red Pine in the North Central States is one of the principal references used in the Department's Silviculture Handbook. Further, the Benzie chart is the standard for forestry management for managed red pine forestry plantations. Mulhern testified to a reasonable degree of professional forestry certainty that the Benzie chart represented good forestry management practice and stated that the use of the chart was appropriate by the Department. Mr. Fries presented no expert testimony which in any way contradicted Mulhern's expert opinion that use of the Benzie chart was appropriate by the Department in managed forest land management plan cases. A clear preponderance of the credible evidence supports the Department's position that use of the Benzie stocking chart is appropriate.

It should be noted that many of the points raised by the Mr. Fries are interesting possibilities for essentially experimental forestry practice. However, the managed forest land program is not an experimental program. Persons entering tracts of land under the program agree to follow a management plan that is acceptable to the Department of Natural Resources. The Department does not want the managed forest land program to be an

experimental program. The taxpayer garners significant tax savings by entering the parcel under the managed forest land program and must accordingly follow good forestry practice as understood by the Department and not pursue theoretically interesting but unproven alternative practices.

10. The question then becomes whether any of Mr. Fries' proposed cutting notices fall within the parameters of the Benzie stocking density chart. The latest proposal of Mr. Fries in April of 1996 anticipated having a residual basal area between 180 and 300 square feet per acre. These stand densities far exceed the accepted density level for managed lake states red pine plantations. (D-Exhibit 14) The earlier proposals of Mr. Fries approximated a residual basal area to 180 to 250 square feet per acre. The Department well-illustrated just how far off the Benzie "A" curve the Fries proposals were. (See: D-Exhibit 22) The Department showed Mr. Fries flexibility in allowing him to pursue a stocking density in the 120 basal area per acre range in pursuit of his stated goals of pursuing pole production. The agreement for the forestry management plan in 1989 was in the 90 basal area per acre range. The 1994 proposal of the Department was in the 120 basal area per acre range. As noted, the latest proposal of Mr. Fries is somewhere between 180 and 300 basal area per acre, well outside the accepted practice for managed red pine plantations.

A clear preponderance of the evidence supports a finding that the proposed cutting notices of Mr. Fries fall well outside accepted forestry practice for managed red pine forestry plantations in the lakes states area. While the plantation may do well in the short term, the long-term health of the forest would be at risk if density levels exceeded accepted forestry practice for managed red-pine stands.

11. Mr. Fries raises a number of other issues in his brief that have no merit. Among these are as follows: that the Department personnel lacks sufficient racial and sexual "diversity"; that the Department's failure to provide a plan for his white pine plantation P-4 constituted negligence by the agency and that the DNR is accordingly entitled to no deference for its professional experience and expertise; that, because certain portions of the 1989 contract were in error, the entire 1989 contract was unenforceable; that the hearing abused the due process of Mr. Fries; that the Department lost information from his file and accordingly engaged in fraudulent misconduct. The ALJ has carefully considered each and every one of these arguments by Mr. Fries and found that they have no merit. Many of these issues are outside the jurisdiction of the administrative law judge in considering whether the statutory standards for managed forest land program have been followed.

DISCUSSION

Mr. Fries has done an excellent job in managing his tree farm. (P-Exhibit 2) This was confirmed by the site inspection. Mr. Fries is a registered professional engineer and is the holder of a masters degree from the Institute of Paper Chemistry. Nonetheless, he is not a professional forester. Fries did not call a professional forester as a witness, but submitted hearsay statements from Dr. Dean Einspahr which took contradictory positions. In his latest statement, June 5, 1996, Dr. Einspahr concluded ". . . that the DNR may be right in their desire to see that the basal area is reduced below 180 square feet when the next thinning of the stand occurs." (P-Exhibit 21) As noted, however, Mr. Einspahr's statements were hearsay and can not be relied upon for the purpose of basing a Finding of Fact. Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 610 (Wis. Ct. App. 1987) Certainly, the evidence did not rebut the extensive expert testimony presented on behalf of the Department indicating that the long-term health of the red pine plantation would be at risk under the density levels proposed by Mr. Fries.

The Department bent over backwards to work with Mr. Fries. Instead of seeking a compromise, Mr. Fries most recent position actually raised projected density levels. It is unfortunate that such an intelligent participant in the Managed Forest Program has given the Department and the ALJ no other choice but to Order Withdrawal of his plantation from the tax-break program.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary Orders relating to withdrawal of Managed Forest Lands pursuant to secs. 227.43 and 77.88, Stats.

2. The purpose of the Managed Forest Lands program is to encourage the management of private forest lands for the production of future forest crops for commercial use through sound forestry practices, recognizing the objectives of individual property owners. Sec. 77.80, Stats.

The Department of Natural Resources is charged by the Legislature with the administration of the Managed Forest Lands program and its judgment as to what constitutes "sound forestry practices" is entitled to deference. Barns v. DNR, 184 Wis. 2d 645, 506 N.W.2d 155 (Ct. App. 1993).

3. Section 77.88, Stats., provides in pertinent part:

WITHDRAWAL; TRANSFER OF OWNERSHIP; NONRENEWAL.

(1) Withdrawal By Department Order. (a) The department may, at the request of the owner of managed forest land or of the governing body of the municipality in which any managed forest land is located, or at its own discretion, investigate to determine whether the designation as managed forest land should be withdrawn. The department shall notify the owner of the land and the chairperson of the town or the president of the village in which the land is located of the investigation.

(b) Following an investigation under par. (a), the department may order the withdrawal of all or any part of a parcel of managed forest land for any of the following reasons:

1. Failure of the land to conform to an eligibility requirement under sec. 77.82(1).
2. The owner's failure to comply with this subchapter or the management plan.
3. Intentional cutting by the owner in violation of sec. 77.86.
4. The owner's development or use of any part of the parcel for a purpose which is incompatible with the purposes specified in sec. 77.80.

...

(c) If the department determines that the land should be withdrawn, it shall issue an order withdrawing the land as managed forest land and shall assess against the owner the tax under sub. (5).

Mr. Fries has "failed to comply with the management plan" within the meaning of sec. 77.88(1)(b)2, Stats.

ORDER

IT IS HEREBY ORDERED that the following land be withdrawn from designation as Managed Forest Land and be assessed as general property beginning the first day of January following the date of this order:

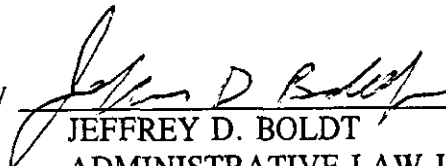
<u>Oneida County, Town of Pine Lake</u>	Open Acres	Closed Acres	Total Acres
Township 37 North, Range 8 East	.00	4.00	4.00
Section 24 SENW, Pt of Lot 004	.00	16.00	16.00
Total Acreage For Order	.00	20.00	20.00

A Withdrawal Tax to be calculated by the Department of Revenue pursuant to sec. 77.88(5), Wis. Stats., is due and payable to the Department of Natural Resources by the last day of January, 1998. If unpaid, the taxation district clerk shall enter the delinquent amount on the property tax roll as a special charge.

Dated at Madison, Wisconsin on January 13, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By


JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.